

NORTH CAROLINA BOARD OF ETHICS

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RALEIGH, NC 27699-1324

September 23, 2005

Mr. Daniel H. DeVane
Chief Deputy Secretary
N.C. Department of Transportation
1501 Mail Service Center
Raleigh, North Carolina 27699-1501

Re: **Department of Transportation**
Board Member's Facilitation of Informal Meeting Concerning a Traffic Problem at the
Member's Church
AO-05-004

Dear Mr. DeVane:

I am happy to respond to your September 7, 2005, request that the Board of Ethics ("BOE" or "the Board") conduct an independent review of Board of Transportation ("BOT") member Larry Helms' involvement with the Indian Trail/Fairview Road project in general and its impact on First Baptist Church Indian Trail in particular. Preliminarily, however, I need to make you aware of the standard limitations on the scope of this response. First, the Department of Transportation ("the Department" or "DOT") and the BOT are covered by other laws, rules, and policies which could apply to this situation. For example, North Carolina General Statutes ("NCGS") §143B-350 sets out the general powers and duties of the BOT, including the responsibilities of both division and at-large members. NCGS §143B-350 (b) (2) & (3). In addition, section 143B-350 (h) mandates that BOT members be consulted before the BOT makes a decision affecting their particular division. Section 143B-350 (k) deals with the BOT's ethics policy in general and conflicts of interest/appearances of conflict in particular.¹ Finally, as you know, the BOT has its own ethics policy which may have a direct bearing on your questions.²

Definitive interpretation of these and other applicable statutes and policies, as well as their specific application to your situation, is a matter for the Department and its legal counsel. The Board of Ethics is charged with interpreting and enforcing the Governor's Executive Order Number One ("EO One" or "the Order"). Any conflict between a provision of the Order and other North Carolina law is resolved in favor of the law. EO One, §5 (a) (3).

With the foregoing limitations in mind, the following report and preliminary advisory opinion is issued by Board staff according to the Board's "Internal Operating Procedures" ("Procedures") and may be relied

¹ Among other things, the BOT's policy shall provide that "[t]he performance of usual and customary duties associated with the public position or the advancement of public policy goals or constituent services, without compensation, shall not constitute the use of the Board member's position for financial benefit." NCGS §143B-350 (k) (1).

² A comprehensive search of all potentially applicable laws, rules, policies, or regulations is beyond the scope of this opinion.

upon until and unless it is formally modified or rescinded by the full Board. Once the Board formally approves, modifies, or otherwise disposes of the preliminary opinion, all pertinent parties will be so notified. All advisory opinions, both preliminary and final, are based upon the particular facts presented or discovered during the course of any necessary investigation and should only serve as a recommendation to the particular parties involved. Opinions may, however, serve as a general guide to other individuals similarly situated.

As part of my investigation into this matter, I reviewed Mr. Benton Payne's memo of September 7, 2005, to you and Mr. Payne's August 12 letter to Reverend Sammy Thomas of First Baptist Church Indian Trail. I also reviewed relevant portions of the BOT minutes and "Abstention From Voting" sheets for February 6, 2003, and June 5, 2003, where the BOT voted to "widen to three lane section SR 1520 (Indian Trail – Fairview Road)." Both the minutes and the abstention sheets show that Mr. Helms abstained from voting on the Union County/Division 10 items.³ I also reviewed Town of Indian Trail letters and memos provided by interested citizens and spoke with several citizens on the telephone. I interviewed, either in person or by telephone, every person who was involved in the August 10, 2005, meeting at First Baptist Church Indian Trail, including Mr. Larry Helms and law enforcement officers having no connection to the DOT or Mr. Helms. Finally, I visited the site and observed the road widening project, the official detour route, the First Baptist Church Indian Trail and connected school, and the improper "cut-through" being used by local traffic.

As a result of the documents and information provided to me, as well as my independent investigation as outlined above, I believe the following is an accurate summary of the pertinent facts. If I am mistaken about any of the material facts, or if there is additional relevant information needed for a complete understanding of the issues involved, please let me know at once. Mr. Helms is an at-large BOT member and resides in Division 10.⁴ First Baptist Church ("the Church") and Indian Trail/Fairview Road are located in DOT's Division 10. In 2001 or 2002, a developer submitted plans to build a new development on Indian Trail/Fairview Road just above (northeast of) First Baptist Church Indian Trail. As part of this development, the developer rebuilt the section of Indian Trail/Fairview Road in front of his property from a two-lane road into a three-lane road. Indian Trail/Fairview Road is currently a three-lane road at the intersection with US 74 just below the Church. The road directly in front of the Church remained two lanes. This created an "hourglass" effect in front of the Church (three lanes narrowing into two and then widening back to three again just past the Church). In order to eliminate this "hourglass" effect, Division 10 staff recommended that the short section of two-lane road in front of the Church be widened to three lanes.⁵ According to all witnesses, Mr. Helms had no involvement with this decision.

³ The minutes also reflect that the Indian Trail project "includes installation of curb and gutter, roadway, sight distance improvement, drainage, erosion control, etc. within the Town of Indian Trail." Again, this took place in 2003.

⁴ Mr. Marion Cowell is the Division 10 representative on the BOT. Division 10 encompasses the counties of Mecklenburg, Union, Anson, Stanly, and Cabarrus. Pursuant to NCGS §143B-350 (b) and EO One, § 3 (f), all BOT members are covered by EO One and thereby subject to the Board of Ethics' jurisdiction.

⁵ The Town of Indian Trail may have even suggested this road-widening project to Division 10 staff, but in any event neither the Church nor Mr. Helms had any involvement with initiation of this project.

Mr. Helms is a member of First Baptist Church Indian Trail. He sits on the Church's personnel committee, which is an advisory body to the pastor and Board of Deacons. Mr. Helms is not a deacon. However, he serves on the board of directors of Metrolina Christian Academy, the K-12 school which is run by the Church and operates on Church property.

Because of his connection with the Church and its school, when the Indian Trail/Fairview Road project came before the BOT for official action, Mr. Helms recused himself from any and all votes relating to that project. See the BOT minutes and "Abstention From Voting" sheets for February 6, 2003, and June 5, 2003, mentioned above. There is no evidence or indication that Mr. Helms influenced or attempted to influence either the BOT's votes on this project or staff's decisions regarding the same. In Mr. Helms' absence, this Division 10 project was reviewed and supported by Board Member Marion Cowell.

After BOT approval, the project went to contract in August 2004. After revision due to utility and additional work, performance dates were August 8 to December 2, 2005 (approximately four months). The contract contained a "Traffic Control" and "Police Officer(s)" provision. The "Police Officer(s)" clause provided for "furnishing Police Officer(s) or marked vehicles simultaneously, or separately to direct traffic in accordance with the plans and specifications." Contract, p. 36. The line-item entry for "Police" listed the total estimated cost for this service to be approximately \$900. The original bid for the contract was \$650,040, but after additions and supplemental appropriations, the total contract price approached \$900,000.⁶

According to the Division 10 Engineer, Mr. Benton G. Payne, many DOT contracts have similar provisions. They are included on a case-by-case basis where needed, depending upon the complexity of the area, traffic volume and pattern, and other factors. An unofficial review of contracts entered into over the past year revealed that 70% to 75% of the contracts had what DOT staff call a "police" provision. Thus while they are not needed, and therefore not included, in all DOT contracts, they are quite common. They are often utilized in projects at or near schools for obvious safety reasons.

Due to right of way and other issues, actual construction on the Indian Trail/Fairview Road project did not begin until August 8, 2005. As it was necessary to close the road during construction, an offsite detour was required. The DOT detour was provided along state system streets which basically made a "C" around the Church property. Access to the Church was provided through city streets. However, rather than take the longer detour route, drivers quickly discovered that they could use the city streets and cut through the Church parking lots to save time and distance.

Serious problems arose immediately. High volumes of traffic from vehicles of all sizes were going through the parking lot, often speeding. Motorists were even getting out of their cars and moving DOT barricades in order to enter the Church property. Church administrators and staff felt this was endangering the lives of Church employees. Several Church employees were almost hit by speeding motorists. They were also very concerned about the nearly 1000 students who were about to begin school at their Metrolina Christian Academy in a few weeks. Even tractor-trailer and other large trucks were taking the unofficial shortcut through the Church parking lots. In addition to safety concerns, DOT and Church officials became concerned about potential damage to the parking lots themselves, as they were not constructed to withstand a high volume of heavy truck traffic.

⁶ Thus, the "police" provision constituted about 0.1% of the entire contract.

After two days of what the Church viewed as a worsening situation, Reverend Sammy Thomas called Mr. Helms and asked if Mr. Helms could direct him to the appropriate people to discuss the problem. As a result, Mr. Helms arranged a meeting on August 10 at the Church of all interested parties, including local law enforcement personnel and Division 10 DOT staff members. They met in the Church parking lot and observed the traffic condition described by Mr. Thomas and others. They discussed what might be done, and one option was to provide off-duty Sheriff's deputies to monitor and direct traffic around the Church. As mentioned, a provision in the 2004 contract anticipated this contingency. This was the only meeting Mr. Helms attended regarding this issue.

Every person interviewed in this matter (including several law enforcement officials totally unconnected with either the DOT or the Church) unequivocally stated that Mr. Helms merely facilitated the August 10 meeting at the Church. He brought the parties together, introduced them, and then stepped back to see if a solution could be achieved. Most witnesses said that Mr. Helms actually said very little at the meeting. There is no evidence or indication that Mr. Helms pressured anyone to take any particular action. To the contrary, senior staff members expressed a willingness and ability to freely express any limitations or difficulties that might exist on the project should that be necessary. They did not feel threatened or afraid. There was also unanimous agreement that the situation at the Church involved a serious health and safety risk that needed immediate attention.

I will now apply Executive Order Number One's "Rules of Conduct for Public Officials" to the foregoing facts. The basic rule of conduct for all covered Public Officials is that they "perform their official duties in a manner to promote the best interests of the public." EO One, §7. This general statement is followed by rules governing both conflicts of interest and appearances of conflict. Conflict of interest rules are aimed primarily at avoiding undue **financial** gain as a result of one's official position. The basic conflict provision is found in section 7 (a) (1):

A Public Official shall not knowingly use his or her position in any manner which will result in financial benefit, direct or indirect, to the Public Official, the Official's family, or an individual with whom or business, organization, or group with which the Public Official is associated.⁷

The first and most fundamental question is whether anything Mr. Helms did worked to his personal financial benefit. Obviously it did not. There is no reasonable or realistic interpretation of either the road widening project in general or the triggering of a pre-existing contractual provision for the use of law enforcement personnel for traffic control in particular that would even arguably inure to Mr. Helms' personal or familial benefit.

The second related inquiry is whether Mr. Helms used his official position in a manner which resulted in a financial benefit to an organization or group (here, the Church) with which he is sufficiently "associated." The Board of Ethics has found in the past that "mere membership" in an organization does not require that a Public Official remove himself from the official decision-making process. See AO-03-002 (January 8, 2004), p.2; AO-99-014 (July 7, 1999). However, service in a leadership or policy-making position in an organization or group does. Order, §7 (b) (2) (definition of "personal relationship"); AO-99-014 (July 7, 1999). This would include service as an officer or on the board of

⁷ This provision does **not** apply to financial and other benefits that are so remote, tenuous, insignificant, or speculative that a reasonable person would conclude under the circumstances that the Public Official's ability to protect the public interest and perform his or her official duties would not be compromised. Section 7 (a) (1) (c).

directors. Here, Mr. Helms does not serve on the leadership body of the Church (he is not on the Board of Deacons or a senior administrative staff member). However, he does serve on the personnel committee of the Church, and, more importantly, he is on the board of the Church's Metrolina Christian Academy, which is considered a part of the Church and is located on Church grounds.⁸ Therefore, I believe Mr. Helms does have a sufficient "association" with the Church to trigger applicable conflict and appearance of conflict provisions of the Order.⁹

However, I did not find that either the road widening project in general or the provision of off-duty law enforcement personnel for traffic control provided a financial benefit to the Church over and above that which would normally be provided on a project of this nature. The road-widening project benefited the entire traveling public in the area. Likewise, enforcing a lawful and necessary detour to prevent injury to private citizens and damage to private property seems not only a legitimate but also an expected function of road construction for the public benefit. Indeed, it can be argued that providing several off-duty Sheriff's deputies over the course of a four-month project costing approximately \$900,000 falls within the "remote, tenuous, insignificant, or speculative" exception to section 7 (a) (1) of the Order. Even if providing off-duty Sheriff's deputies under these circumstances provided some financial benefit to the Church, this was decided and actually "provided for" in the initial approval of the project and drafting of the contract, actions with which Mr. Helms had no involvement.

Therefore, I do not believe that Mr. Helms violated the conflict provision of section 7 (a) of the Order. This brings us to section 7 (b) on appearances of conflict. Appearances of conflict cover a broader spectrum of conduct. Section 7 (b) (1) states,

A Public Official shall make every effort to avoid even the appearance of a conflict of interest. An appearance of conflict exists when a reasonable person would conclude from the circumstances that the Public Official's ability to protect the public interest, or perform public duties, is compromised by familial, personal, or financial interests. An appearance of conflict could exist even in the absence of a true conflict of interest.

Section 7 (b) (2) adds,

A Public Official shall take reasonable and appropriate steps, under the particular circumstances and considering the type of proceeding involved, to remove himself or herself, to the extent necessary to protect the public interest and comply with this Order, from any proceeding in which the Public Official's impartiality might reasonably be questioned due to the Official's familial, personal, or financial relationship with a participant in the proceeding....

"Proceeding" includes ... both quasi-judicial proceedings (like contested case hearings) and quasi-legislative proceedings (like most rulemaking).

⁸ One of the major traffic safety concerns involved the school's students.

⁹ Indeed, it was this association or connection with the Church that triggered Mr. Helms' initial recusal from BOT votes in 2003. The evidence is overwhelming that Mr. Helms was not involved with the road-widening project's initiation two or three years ago, that he had nothing to do with inclusion of the traffic-control provision in the original contract (on August 10 he was unaware the provision existed), and that he recused himself from all BOT votes regarding this Division 10 project.

Again, it cannot be overemphasized that Mr. Helms totally and completely recused himself from all official BOT votes on the Indian Trail/Fairview Road project. DOT staff recognized his association or connection with the Church and brought it to his attention before any official action was taken. Mr. Helms concurred and stayed out of the official decision-making. The system worked as it was intended to.

Long after all BOT official actions had been taken, Mr. Helms responded to an inquiry about solving a serious problem in his Division. Unfortunately, it involved his church and its school. He openly and admittedly arranged a meeting of the people and parties who could possibly solve the problem. He attended the meeting and, according to all of those in attendance, merely introduced everyone and acted as a “facilitator.” There is no evidence that he pressured or lobbied anyone, least of all DOT employees, to take particular action regarding the situation.

Therefore, I do not believe that an informal meeting of interested parties is the type of “proceeding” contemplated by section 7 (b) of the Order, and thus Mr. Helms’ facilitation of and attendance at such meeting did not violate this provision. Nor do I believe that Mr. Helms improperly lobbied or attempted to influence any official action he was otherwise barred from taking directly.

By way of prospective guidance and advice to Mr. Helms and other similarly situated Public Officials, is there anything he could or should have done differently? In situations like this where there is a known, acknowledged, and acted-upon connection between the Public Official and the subject of some official action, even though it is not required by the Order, Public Officials should consider avoiding related unofficial actions or situations which could lead to the perception that some sort of non-public interest is coming into play. If a Public Official has to recuse himself from the underlying or preceding *official* action, he should pay special attention and be particularly sensitive to the appearance ramifications of related *unofficial* actions.

I hope this report and opinion adequately addresses the specific questions raised in your request. If there is anything further I can do, please do not hesitate to call on me.

Sincerely,
Perry Y. Newson
Executive Director